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## Letter dated 25 October 2004 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General

Enclosed please find Israel's response to the report submitted by John Duggard, Special Rapporteur of the Commission on Human Rights, pursuant to Commission resolution 1993/2A (A/59/256), which Israel views with concern (see annex).

I would be grateful if you could arrange for the present letter and its annex to be circulated as a document of the Third Committee, under agenda item 105 (c).

(*Signed*) Dan **Gillerman**
Permanent Representative

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**Annex to the letter dated 25 October 2004 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General**

# Response of Israel to the report submitted by John Duggard, Special Rapporteur of the Commission on Human Rights, pursuant to Commission resolution 1993/2A

## A. Introduction

The latest Report by the Special Rapporteur bears all the hallmarks of its predecessors. It is characterised by serious errors of omission and commission, as well as distortions of both fact and law, all in the service of a narrow and extreme political agenda.

Israel has long noted the seriously problematic mandate of the Special Rapporteur, unprecedented in its one-sided and prejudgmental nature, but over the past few years the problematic mandate has been overshadowed by the problematic nature of the Rapporteur himself. Again and again he has demonstrated, both in his reports and in his diatribes to the media, that he regards the title of Special Rapporteur as nothing but a platform for broadcasting his personal prejudices, and the actual situation in the region as merely fabric to be cut and shaped to conform to his predetermined political agenda.

Many, if not most, of the Rapporteur's allegations have been addressed, some repeatedly, in Israel's responses to his previous reports. However, even at the risk of repetition, some of the more egregious distortions cannot be left without some response.

## B. General Observations

Before addressing the issues that the Rapporteur takes as the focus of his Report, a number of general observations are in order.

**Context:** As in previous reports, the daily threat of terrorism faced by Israel is simply ignored. With the exception of a passing reference – in a list of Israeli human rights '***violations***'(!) – to the 1000 Israelis who have been killed and the 6000 injured since the outbreak of Palestinian violence, there is, in the 36 pages of the report, not a single reference to the terror faced daily by Israeli civilians, including 138 suicide attacks and 13,730 shooting attacks over the past four years. Nor is there any mention of the attempted mega-terror attacks against Israeli skyscrapers, ports and fuel depots, which could so easily have taken the lives of thousands more.

**Balance:** The failure to address the terrorism faced by Israel, does not simply mean that the picture painted by the Rapporteur is incomplete; it undermines any possible basis on which a balanced assessment of Israel's defensive measures could be made. The legal and moral test for such measures is whether they are, in all the circumstances, a proportionate response to the threat faced by Israel. If

there is no such threat, then no measure will be considered acceptable. And indeed, in the idyllic terror-free world presented by the Rapporteur, this is the case. ***Not a single measure taken by Israel to protect the lives of its civilians has ever been found by the current Rapporteur to be proportionate or acceptable.***

**Omission of inconvenient facts**: The brutal terrorism faced by Israel is only one of the inconvenient facts ignored by the Report. Other striking omissions include:

- *Significant changes in the route of the security fence.* The Report describes the International Court of Justice as having passed judgment on the fence "that Israel is presently constructing", implying that the route of the fence has remained unchanged. In practice, over recent months there have been dramatic changes to the route in order to limit the impact on Palestinians, even at the risk of decreasing the protection provided to Israeli civilians.

- *Humanitarian arrangements.* No reference is made by the Rapporteur to any of the measures taken by Israel to ensure continued medical and water supplies, the daily transportation of children to schools, and the many other measures undertaken by Israel to help ease the humanitarian situation in the territories.

- *Corruption and mismanagement in the Palestinian leadership.* The Rapporteur stresses that "poverty and unemployment are rampant" among the Palestinian population but fails to mention the rampant corruption which has resulted in billions of dollars of donor funds, intended to alleviate hardship and suffering, being diverted to the private accounts of the Palestinian leadership.

**Unfounded allegations:** The Report is littered with unsubstantiated assertions introduced by such amorphous phrases as: 'The evidence suggests' and "It seems that". In his attempt to present baseless accusations as facts, the Rapporteur has turned the use of the passive voice into an art, such as the bizarre allegation that the installation of 'high-tech listening devices' in major buildings in the Gaza Strip "is being contemplated" or the chilling echo of the medieval blood libel: "There are also allegations of well poisoning by settlers."

**Misstatements and distortions:** A few of the more striking examples of the Report's distortions:

- *Of fact:* The Rapporteur states that 10 homes and shops in the village of Azzum Atma were demolished "because they are too close to the Wall". In fact the route of the fence in this area is still to be decided; the structures in question were actually illegal constructions, built in violation of planning regulations, which, like all such structures, were demolished only after full due process.

- *Of law:* In trying to argue that following its withdrawal from the Gaza Strip, Israel will remain an 'occupying power', the Rapporteur states the legal test of occupation as being "not whether the Occupying Power fails to exercise effective control over the territory, but whether it has

the ability to exercise such power". This assertion has no legal basis whatsoever. As authority the Special Rapporteur cites the Nuremberg Military Tribunal *Hostages Case*, presumably referring to the Court's observation concerning Greece and Czechoslovakia, that the fact that "partisans were able to control sections of these countries at various times" did not deprive the German forces of their status as an occupant. Even if the Rapporteur himself was not able to distinguish between occasional pockets of partisan control and the wholesale withdrawal of Israel's presence from the Gaza Strip, a cursory reading of the judgment would have shown that it restates, with approval, the 1907 Hague regulations which are a clear and succinct statement of international law in this regard:

> Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.

- *Of Israeli positions:* The Special Rapporteur criticizes "the Israeli argument that security considerations provide it with an absolute right to build the Wall in Palestinian territory". But no absolute right has ever been claimed by Israel. To the contrary, Israel has consistently held that it must seek to find the correct balance between the rights of Israelis to be protected from terror, and the right of Palestinians to live their lives without disruption.

- *Of legal judgments:* The Rapporteur cites the recent decision of the Israel Supreme Court in *Beit Sourik Village Council vs. the Government of Israel* on numerous occasions throughout his Report, almost unfailingly in a misleading manner. For example, seeking to substantiate his assertion that the fence should have been routed along the 'Green Line', he asserts that this is proven by the fact that at certain points the Court preferred less intrusive security proposals suggested by the Israeli Council for Peace and Security. At no point does he note that both the Court and the Council were in agreement that the only effective route of the fence would involve incursions within the West Bank. (The full text of the judgment is available at http://62.90.71.124/eng/verdict/framesetSrch.html)

## C. Focus of the Report

The Special Rapporteur states that his intention in the current Report was to focus on three issues: military incursions into the Gaza Strip, the construction of the "Wall", and restrictions on freedom of movement:

### Incursions into the Gaza Strip

The Special Rapporteur devotes his attention to two specific areas within the Gaza Strip: Rafah and Beit Hanoun. These are indeed two areas in which Israel has conducted military operations, since each is a major center of terrorist activity. But the terrorist attacks emerging from these areas are quickly dismissed by the Special Rapporteur:

> The reasons advanced by Israel for these incursions are, in the case of Rafah, the destruction of tunnels used for smuggling of arms and in the case of Beit Hanoun, the destruction of the capacity to launch Qassam rockets into Israel. However these incursions must be seen in a broader political perspective.

Predictably, the broader perspective offered by the Rapporteur has nothing to with the terrorist threat faced by Israel, and everything to do with political gains which he surmises are Israel's true motivation.

But in fact, far from being a pretext for a political gambit as the Rapporteur suggests, the tunnels constructed by terrorists in the Rafah area are one of the most lethal threats to the lives of Israeli civilians. Since the outbreak of Palestinian violence four years ago over 98 tunnels have been discovered, running deep under the ground from the Gaza Strip into Egypt, used for the smuggling of weapons, including anti-aircraft missiles, mortars and machine guns, and ammunition. More recently, tunnels have also been used for the transportation of terrorists and the perpetration of terrorist attacks. The tunnels are sophisticated; many run for several hundred meters at depths of up to 10 meters below ground, and are equipped with electricity and ventilation systems.

The fact that the tunnels are deliberately located within and beneath civilian homes creates acute dilemmas for Israeli forces seeking to put them out of action. But only willful blindness on the part of the Special Rapporteur could explain his description of the destruction of such houses "wanton" and "purposeless".

A similarly judgmental approach is taken by the Special Rapporteur in relation to Israeli action against terrorists firing Kassam missiles from in Beit Hanoun. For the Rapporteur, Israel's entry into this area ("accompanied by the customary bulldozers") had nothing to do with preventing attacks but is simply gratuitous punishment.

In fact, since the outbreak of Palestinian violence there have been 325 Kassam missile attacks against Israeli homes from within the Gaza Strip. The Israeli town of Sderot has been a repeated target with missiles falling within schools and homes. Since the start of 2004 there have been over 160 Kassam attacks, the vast majority aimed at towns and villages within Israel. Over the past three months four Israelis, three of them children, have been killed in such attacks. In the absence of any action whatsoever by the Palestinian authorities to prevent these attacks, Israel has no choice but to seek to stop the missiles before they are fired, and to destroy the factories where they are assembled.

The Special Rapporteur , unsparing in his criticism of Israel's actions, has not a word of criticism for the terrorists who callously set up shop in the heart of civilian areas, and who fire Kassam missiles from behind schools and hospitals. To the contrary, the Rapporteur's strident call for action ("The time has come for the international community to identify those responsible for this savage destruction of property and to take the necessary legal action against them") is directed exclusively against Israel.. Perhaps this is not surprising, in the light of the adulation he has demonstrated for the missile firing terrorists in his earlier Reports, admiringly describing "militarized groups armed with rifles, mortars and Kassam-2 missiles confront[ing] the IDF with new determination, daring and success".

**The Security Fence**

In previous Reports, the Special Rapporteur has raised doubts as to whether Israel's security fence would be effective in preventing terrorist attacks, suggesting that "the Wall will not deter persons determined to cross into Israel to commit acts of terrorism".

In practice though, the impact of the security fence on the ability of terrorist groups to perpetrate suicide attacks has been remarkable. In 2002, suicide terrorist attacks killed 452 people, and injured 2309. It was one of these attacks, the Passover festival massacre in the Park hotel in Netanya in which 28 people were murdered and 65 injured, that gave the impetus for the construction of the security fence. The following year, with the northern section of the fence partially constructed, the number of attacks dropped by more than half to 26, with 214 people killed. Since the completion of the northern section in August 2003 there have been only 6 suicidal attacks.

No longer able to argue that the fence is not an effective measure in saving lives, the Special Rapporteur now argues that "there is no compelling evidence that suicide bombers could not have been as effectively prevented if the Wall had been built along the Green Line".

By insisting that Israel can only defend itself by constructing a fence along, or within, the so called 'Green Line', the Special Rapporteur is guilty of the very offence that he attributes to Israel – seeking to make political gains in the guise of security measures. As the Israeli Supreme Court held in the Beit Sourik case:

> We cannot accept this argument [that the fence should be constructed on the 'Green Line']. The opposite is the case: it is the security perspective – and not the political one – which must examine a route based on its security merits alone, without regard for the location of the Green Line.

As to whether a fence along this route could be effective, the Special Rapporteur gives no indication as to how an arbitrary and temporary armistice line, never intended either as a border or a defensive boundary, which runs though villages and valleys with high ground on either side, could prove an effective line for Israel's temporary security fence. Nor does he mention those areas where, for topographical reasons, the fence juts not into the West Bank but into Israel.

To anyone remotely familiar with the complexity of preventing terrorist attacks, the Rapporteur's armchair security prescriptions are simplistic and tasteless. Writing of the route of the fence in the Jerusalem area, he opines: "it separates Palestinians from Palestinians and can in no conceivable way be justified as a security measure". One can only wonder whether the Rapporteur can really be talking about the same Jerusalem that has seen 7 buses and three restaurants blown up in the past 4 years, in attacks that the temporary fence might have prevented.

But perhaps most troubling, is the Rapporteur's implication that Israelis living beyond the 1967 line are not entitled to protection, or even that attacks against them may not even qualify as terrorism. The aim of the fence, in the eyes of the Special Rapporteur can only be to prevent suicide bombers "from

entering Israel". This echoes the Rapporteur's disregard, in his previous reports, of the murder of Israeli civilians within the territories, limiting his condemnation to suicide bombers causing death "within Israel" or those prepared "to spread terror throughout Israel". But the terrorists themselves make no such distinction, and the past four years of violence have seen Israeli children, women and men blown apart by Palestinian bombers, and murdered by Palestinian snipers, irrespective of which side of the 1967 line they happen to be on.

Having ignored terrorism as the reason for the construction of the fence, the Special Rapporteur offers his own interpretation of Israel's motivations. "The evidence suggests", he tells us, that there are three "more convincing explanations" for Israel's actions: "to incorporate settlers within Israel, to confiscate Palestinian land [and] to encourage an exodus of Palestinians":

***"To incorporate settlers within Israel"***

The Rapporteur uses the word "incorporation" to fudge the gulf between what he is accusing Israel of doing - annexing settlers, and what it is actually doing – protecting them. The route of the fence is indeed designed to include and protect Israelis living close to the 1967 line, where this is possible without causing undue hardship to the Palestinian population. This is without prejudice to their status, or the status of the land on which they are living, which remains unchanged. The point was clearly stated by Israel's foreign minister, Silvan Shalom, on March 17, 2004:

> The fence is solely a defensive measure, intended to protect Israelis from suicide bombings and other terrorist attacks. It is not a political act. It is not intended to be a border or to prejudge any future negotiations with the Palestinians. It has no effect on the status of the land on which it is constructed. It is simply the most effective method we have found, after over 20,000 separate terrorist attacks in the last three and half years, to save the lives of our civilians.

The Rapporteur also ignores Israel's repeated statements that the fence is not intended to have any permanent effects, but is temporary in nature. As Israel's foreign Minister continued:

> The fence is temporary, its sole purpose is security, and it can be moved or removed in accordance with any agreement we may reach. Israel has moved hundred of kilometers of fences in the past, despite the expense involved, when we signed peace agreements with Egypt and Jordan, and when we left Lebanon. The fence is reversible. The lives taken by terrorism are not.

***"To confiscate Palestinian land"***

Here too the Special Rapporteur is less than careful in his use of language, asserting that the fence is intended to "expand Israel's territorial possessions" and that land and water resources have been "incorporated into Israel". But not only, as noted above, does the fence have no effect on the status of the land, Israel has made extensive efforts to ensure continued access of landowners to their fields and water resources. These measures include the establishment of 24 agricultural gates and 7 crossing

points in those parts of the fence that have been constructed, the construction of new infrastructure to maintain water supplies, and daily coordination between the Civil Administration and the local population.

In the Rapporteur's world of 'incorporation' and 'confiscation', such arrangements simply do not exist. Consider the Rapporteur's description of the effect of the fence in the Jayyous and Isla areas:

> The Wall has been built between Jayyous homes and rich Jayyous farmland, thereby separating Jayyous farmers from their land...The same pattern was apparent near the village of Isla.

In fact, in the area of Jayyous, two agricultural gates are in operation, enabling the passage of dozens of farmers to and from their fields every day. In the village of Isla, a similar gate is operation, currently with extended hours to enable farmers to reap the olive harvest.

The Rapporteur is similarly silent about the right of every individual affected by the fence to receive full compensation, both for the use of the land, and for any loss of profits, as detailed in Israel's responses to the Rapporteur's previous reports

***"To encourage an exodus of Palestinians"***

The Rapporteur gives not a shred of evidence for the serious accusation that there is a "forced exodus" or that there has even been any decrease in the population of the seam zone. In fact, the population of the seam zone ***has*** decreased, but only because Israel has rerouted the fence westwards, reducing the number of Palestinians living west of the fence. As an example, in an effort to ease the impact of the fence, Israel has moved it so as not to include the village of Baka El-Sharkia, reducing the number of Palestinians included within the route by some 7000 people.

In his enthusiasm to present his thesis that the fence is intended to create a "forced exodus", the Rapporteur also fails to mention the extensive consultation process in the course of the construction of the fence, under which every affected individual has the right to lodge objections as well as petition Israel's Supreme Court for redress. Dozens of such petitions have been filed, resulting in many changes to both the route of the fence as well as to access and humanitarian arrangements.

The Rapporteur's fabrication of a "forced exodus" theory is all the more striking in the light of his silence in relation to the genuine forced exodus of Christians from Bethlehem. As documented in the International Religious Freedom Report, 2004, approximately 2,400 Christians from the Bethlehem area have left the territories for other countries, in large part as a result of the failure of the Palestinian Authority to prevent the seizure of their land by criminal gangs, and the collusion of the Palestinian security forces in such seizures.

**Freedom of movement**

The Rapporteur graphically details restrictions on the movement of Palestinians which, he tells us, "cause personal suffering and inconvenience to every Palestinian". Of the 'personal suffering and inconvenience' of Israelis blown up in buses or shopping malls by terrorists abusing their freedom of movement, he has nothing to say.

In fact, largely as a result of the effectiveness of the security fence, Israel has been able to ease many of the restrictions on movement within the territories. There has been a marked decline in the need for curfews, and dozens of checkpoints and roadblocks have been removed. (Since last August the number of checkpoints has been reduced from 71 to 47 and the number of roadblocks from 197 to 111). Israel continues to make special efforts to ensure the unimpeded movement of schoolchildren, and funds special transportation for the 160 children who have to cross the security fence to get to school. The restrictions referred to by the Rapporteur on movement through the Rafah terminal have also been lifted.

But the facts on the ground hold little interest for the Rapporteur. Rather than devoting any attention to these positive developments (he does, in passing, mention the reduction in the use of curfews), he devotes his energy to insisting that by designating certain sensitive roads for Palestinian and Israeli traffic, in the face of widespread sniper attacks and drive-by shootings by Palestinian terrorists, "Israel has gone beyond the scope of restrictions on freedom of movements imposed by apartheid". The Rapporteur's wild allegations of "road apartheid" and his troubling inability to distinguish Israel, a democracy in which Jewish and Arab citizens have equal rights to vote, to petition the courts and to freedom of expression, from the apartheid regime in South Africa, tell us little about the situation the report is meant to describe, but reveal much about the psychology of the individual entrusted with writing it.

**D. Conclusion**

At the time that the Special Rapporteur was writing his current report castigating Israel's security fence, suicide bombers blew up two buses in the city of Beersheba, in an area where the fence has not yet been built. 16 civilians, including a three year old boy, were killed, and 100 injured. Had the southern fence been constructed, their lives could have been saved.

As he was preparing his diatribes against Israel's defensive strikes in the Gaza Strip, terrorists fired Kassam missiles on the Israeli town of Sederot, killing Yuval Abebe, age 4, and Dorit Aniso, age 2, while they played outside their grandmother's house.

And yet, without a hint of shame or embarrassment, the Special Rapporteur continues to present the bizarre virtual reality dictated by his political agenda, in which there is no terrorist threat and no terrorists, no Israeli rights and no Palestinian obligations.

There is an important debate to be had about the painful and acute dilemmas involved in striking the correct balance between the right of Israelis to be protected from terror, and the right of Palestinians to live their lives unimpeded. But the simplistic picture painted by Rapporteur, and his arrogant and unfounded security prescriptions, have nothing to contribute to such a debate.

The tragedy of entrusting the role of the Special Rapporteur to such an individual is not only the disrepute that it brings to bear on the Commission of Human rights, nor even the offence it causes to Israeli victims of terrorism. Ultimately, the greatest damage is the disservice that it provides to the Palestinian people whose cause the Rapporteur so misguidedly believes he is helping. Ignoring, as he does, any hint of corruption, of mismanagement, of incitement to violence and collusion in terrorism, does not serve the Palestinian cause. To the contrary, this patronizing approach only perpetuates the abuses of human rights, the persecution of minorities and the theft of billions of dollars of donor funds intended to help those Palestinians most in need.

Ultimately, this Report reveals the sad truth that the current Rapporteur has little concern for the development of a responsible, free and flourishing Palestinian society and is nothing more than an apologist for the oppressive regime that continues to frustrate the genuine aspirations of the Palestinian people.

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